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No. 05-1120

In the Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this challenge to the denial by the Environmental Protection Agency of petitioners' rulemaking petition, petitioners adequately established standing—*i.e.*, that their alleged injuries were caused by the denial of the rulemaking petition and would be redressed by a judicial decision in their favor in this case.

2. Whether the court of appeals correctly determined that EPA lawfully exercised its discretion in denying petitioners' rulemaking petition seeking regulation of carbon dioxide and other greenhouse gas emissions from mobile sources (such as cars and light trucks) under Section 202(a)(1) of the Clean Air Act, 42 U.S.C. 7521(a)(1), where, among other things, EPA believed pertinent scientific and technological issues could be better analyzed after the completion of ongoing studies.

3. Whether EPA correctly determined that the Clean Air Act does not in any event give it authority to regulate greenhouse gas emissions for the purpose of addressing concerns about global climate change.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 415 F.3d 50. The decision of the Environmental Protection Agency (Pet. App. A59-A97) is published at 68 Fed. Reg. 52,922.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2005. Petitions for rehearing were denied on December 2, 2005 (Pet. App. A94-A98). The petition for a writ of certiorari was filed on March 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision of the court of appeals upholding the denial by the Environmental Protection Agency (EPA) of a rulemaking petition seeking regulation of emissions of carbon dioxide and three other greenhouse gases from new motor vehicles under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* In denying the petition, EPA first determined that it did not have authority under the CAA to regulate emissions of greenhouse gases to address concerns about climate change. See Pet. App. A59-A93. The Agency further explained that even if it had the requisite regulatory authority, it would still deny the rulemaking petition for a number of other reasons, including its desire to have the benefit of ongoing scientific and technical studies before making a regulatory decision of such complexity and potential effect. *Id.* at A80-A87. Numerous petitioners challenged the denial of the rulemaking petition, but the court of appeals denied their petitions for review. See *id.* at A1-A58.

1. Sections 108 and 109 of Title I of the CAA, 42 U.S.C. 7408-7409, authorize EPA to set national ambient air quality standards (NAAQS) for air pollutants that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare and that are emitted by numerous or diverse sources. Section 110 of the CAA, 42 U.S.C. 7410, establishes a federal-state partnership for meeting NAAQS in local air quality control regions through state implementation plans.

While most of the provisions in Title I of the CAA focus on stationary sources of air pollution, Title II of the Act establishes a regulatory framework for federal control of pollution from motor vehicles and other mobile sources. See CAA Sections 202-250, 42 U.S.C. 7521-7590. This case

specifically involves Section 202(a)(1) of the CAA, 42 U.S.C. 7521(a)(1), which authorizes EPA to "prescribe * * * standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

Section 302 of the Act, 42 U.S.C. 7602, sets forth general definitions applicable to the CAA as a whole. Section 302(g), 42 U.S.C. 7602(g), defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air[,]" including any precursors to the formation of such air pollutant. "[E]ffects on welfare" is defined to include "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, and damage to * * * property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. 7602(h).

2. On October 20, 1999, the International Center for Technology Assessment and several other parties filed a rulemaking petition asking EPA to regulate emissions of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from new motor vehicles. The petition alleged that emissions of those "greenhouse gas[es]" from motor vehicles contributed to global climate change, satisfied the criteria for regulation under Section 202(a)(1) of the Act, 42 U.S.C. 7521(a)(1), and would be feasible for EPA to regulate. See Pet. App. A59-A63. After soliciting and considering approximately 50,000 public comments, see *id.* at A63, EPA issued a written decision denying the petition. *Id.* at A59-A93.

EPA first concluded that Congress did not provide it with authority in the CAA to regulate carbon dioxide and other greenhouse gases to address concerns about global climate change. Pet. App. A67, A68-A79. EPA explained that it must be cautious about "using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues when Congress has specifically addressed those areas in other statutes." *Id.* at A68 (citing *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). In that regard, EPA noted that the only provisions of the Act that specifically mention carbon dioxide or "global warming" are non-regulatory in nature, and pointed out that when Congress elsewhere wanted to address an analogous type of global environmental issue—stratospheric ozone depletion—it added an entirely new set of provisions to the CAA specifically tailored to that problem and its international dimensions. *Id.* at A70-A72. EPA further noted that Congress had enacted non-CAA legislation in recent years specifically directed to climate change, and had rejected numerous attempts to give EPA authority to regulate greenhouse gas emissions to address climate change. *Id.* at A75. For those and other reasons, EPA determined that the CAA, read as a whole, did not provide the Agency with authority to promulgate the type of regulation sought by petitioners. *Id.* at A78.

EPA also explained why, even if it had the requisite CAA regulatory authority, it would deny the rulemaking petition. Based in large part on its review of a 2001 report on global climate change by the National Research Council (NRC), EPA identified numerous areas of scientific uncertainty involving the mechanisms of climate change, its potential effects on human health and the environment, and the means by which such issues can most effectively be addressed. Pet. App. A82-A84. Noting NRC's conclusion that

"[t]he understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences of climate change are poorly understood," EPA found that "[s]ubstantial scientific uncertainties limit our ability to assess each of these factors and to separate out those changes resulting from natural variability from those that are directly the result of increases in anthropogenic [greenhouse gases]." *Id.* at A84; see *id.* at A83 (the "science of climate change is extraordinarily complex and still evolving"). EPA explained that "[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it, EPA believes it is inappropriate to regulate [greenhouse gas] emissions from motor vehicles." *Id.* at A86. EPA identified a variety of ongoing efforts that were then underway to further investigate the areas of scientific and technical uncertainty, and explained its view that "establishing [greenhouse gas] emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies." *Id.* at A85.

EPA also explained that any effort by it to regulate greenhouse gas emissions from motor vehicles at this time would necessarily raise other important legal and policy concerns, such as possible interference with foreign policy considerations including the United States' negotiations with developing nations. Pet. App. A86. In addition, since at present "the only practical way to reduce tailpipe emissions of [carbon dioxide] is to improve fuel economy," *id.* at A79, a regulation directed to that end would present problems of coordination and inconsistency with the statutory scheme of the Energy Policy and Conservation Act (EPCA), 49 U.S.C. 32901-32919, which authorizes the De-

partment of Transportation (DOT) to set fuel economy standards. Pet. App. A79-A80, A86-A87.[1]

3. Numerous petitions for review of EPA's denial of the rulemaking petition were filed in the D.C. Circuit. On July 15, 2005, the court of appeals decided the consolidated case in EPA's favor, finding that the challenges to EPA's action should be denied. Pet. App. A1-A58.[2] Judge Randolph filed the judgment of the court, but each of the three judges on the panel filed a separate opinion adopting a distinct analysis.

a. EPA challenged petitioners' standing to bring this case, arguing that petitioners had failed to show causation (*i.e.*, that their alleged injuries were caused by EPA's decision not to regulate emissions of greenhouse gases from new motor vehicles) and redressability (*i.e.*, that their alleged injuries could be redressed by a judicial decision in their favor in this case). Judge Randolph stated that the declarations submitted by petitioners "'support each element' of standing" sufficiently to survive a summary judgment motion. Pet. App. A8 (quoting *Sierra Club* v. *EPA*,

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[1] In EPCA, Congress set the corporate average fuel economy (CAFE) standard for "passenger automobile[s]" (a term that includes a variety of vehicles carrying up to 10 passengers). 49 U.S.C. 32901(a)(16), 32902(b). Congress also provided that any DOT action increasing (or significantly decreasing) the stringency of the standard be subject to congressional review and potential disapproval. 49 U.S.C. 32902(c). Moreover, Congress designed EPCA to allow automobile manufacturers substantial flexibility in meeting CAFE standards through credit banking and borrowing provisions. 49 U.S.C. 32903.

[2] Several of the petitions for review attempted to challenge the memorandum by EPA's General Counsel that was cited in EPA's decision. See Pet. App. A6. Judge Randolph rejected those challenges, on the ground that the memorandum was not final agency action subject to judicial review. *Ibid.* Neither Judge Sentelle nor Judge Tatel dissented from that disposition or otherwise discussed it.

292 F.3d 895, 899 (D.C. Cir. 2002)). But he observed that the record also "contains a wealth of * * * 'other evidence,' and some of it contradicts petitioners' claim that greenhouse gas emissions from new motor vehicles have caused or will cause a significant change in the global climate." *Id.* at A9. He concluded that, in that unusual situation, the court should "proceed to the merits with respect to EPA's alternative decision not to regulate on the grounds, among others, that the effect of greenhouse gases on climate is unclear and that models used to predict climate change might not be accurate." *Ibid.* See *id.* at A9-A10; *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (discussing permissibility of proceeding to the merits before resolving statutory standing issues).

Judge Sentelle concluded that petitioners did not have standing. In his view, they had "alleged and shown no harm particularized to themselves," Pet. App. A17, but instead had merely shown that "[e]mission of certain gases that the EPA is not regulating may cause an increase in the temperature of the earth," that "[t]his is harmful to humanity at large," and that "[p]etitioners are or represent segments of humanity at large," *id.* at A18. In Judge Sentelle's view, that "would appear to be neither more nor less than the sort of general harm eschewed as insufficient to make out an Article III controversy by the Supreme Court and lower courts." *Ibid.* Nonetheless, because his preferred resolution of the case (dismissal for lack of jurisdiction) was different from the resolutions urged respectively by Judge Randolph (denial of the petition for review) and Judge Tatel (grant of the petition for review) and thus would have prevented issuance of any judgment commanding a majority of the court, Judge Sentelle accepted as law of the case the view of Judges Randolph and Tatel that the court had jurisdiction to issue a judgment and then "join[ed] Judge

Randolph in the issuance of a judgment closest to that which [Judge Sentelle himself] would issue." *Id.* at A20.

Judge Tatel, alone of the panel members, concluded that petitioners had shown that they had standing in this case. In his view, the declarations submitted by Massachusetts adequately established that global warming would cost the State a particularized "loss of land within its sovereign boundaries" as sea levels rise. Pet. App. A27. He concluded that, with respect to causation, other declarations adequately established "that global warming is chiefly triggered by human-caused [greenhouse gas] emissions." *Id.* at A28. With respect to redressability, he found that a declaration submitted by petitioners adequately established that regulating greenhouse gas emissions from motor vehicles in the United States "would . . . delay and moderate many of the adverse impacts of global warming." *Id.* at A29. He also noted that another declaration asserted that a decision by EPA to regulate greenhouse gases would lead to improved technologies, which would in time be required by other countries around the world. *Ibid.* Finally, he stated that no factual disputes on those issues had to be resolved, because EPA did not cite or otherwise advance any record evidence in support of contrary findings. *Id.* at A30.

b. On the merits, Judge Randolph stated that he would merely "assume *arguendo* that EPA has statutory authority to regulate greenhouse gases from new motor vehicles," Pet. App. A10, but that the petition for review should nonetheless be denied because the Administrator "properly exercised his discretion * * * in denying the petition for rulemaking," *id.* at A15. He noted the substantial uncertainty in the "current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases," an uncertainty that "is compounded by the

possibility for error inherent in the assumptions necessary to predict future climate change." *Id.* at A12. He also noted that, because Section 202(a)(1) "directs the Administrator to regulate emissions that 'in his judgment' 'may reasonably be anticipated to endanger public health or welfare," it "gives the Administrator considerable discretion" to take into account not only "scientific evidence" but also what may be called "policy judgments." *Id.* at A13. He concluded that, especially given that the rulemaking petition required EPA to "resolve issues 'on the frontiers of scientific knowledge,'" the "EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking." *Id.* at A15 (quoting *Environmental Def. Fund* v. *EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978)).

As noted above, Judge Sentelle did not address the merits of EPA's denial of the petition for rulemaking in his opinion.

Judge Tatel dissented. Pet. App. A21-A58. In his view, EPA had erred in concluding that it had no statutory authority to regulate greenhouse gas emissions from motor vehicles—an issue on which neither of the other panel members expressed an opinion. *Id.* at A31-A42. Judge Tatel also stated that EPA had erred in concluding that, even if it did have that regulatory authority, it would nonetheless decline to make an "endangerment" finding here. In his view, Section 202(a)(1) authorizes the EPA Administrator, in determining whether a pollutant "in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," only "to determin[e] whether the statutory standard for endangerment has been met." *Id.* at A46. Moreover, Judge Tatel concluded that the scientific uncertainties associated with global warming, see *id.* at A50-A54, the overlapping responsibilities of the Department of Transportation in

setting fuel economy standards, see *id.* at A55, and the potential for interference with the United States' ongoing negotiations with other nations, see *id.* at A56, did not justify EPA's action.

4. The court of appeals denied a petition for rehearing en banc. See Pet. App. A94-A97. Judge Tatel filed an opinion dissenting from the denial of rehearing en banc, in which Judge Rogers joined. See *id.* at A95-A98. Judge Griffith also would have granted the petition for rehearing en banc, but he did not join Judge Tatel's dissent from the denial of that petition. *Id.* at A95.

ARGUMENT

Petitioners argue that the Clean Air Act required EPA to embark on the extraordinarily complex and scientifically uncertain task of addressing the global issue of greenhouse gas emissions by regulating mobile sources of such emissions in the United States. Although the court of appeals did not itself reach a firm conclusion regarding petitioners' standing, petitioners failed to make the necessary showing of causation and redressability to satisfy Article III standing requirements. On the merits, EPA reasonably concluded that regulation of greenhouse gases by means of vehicle emissions standards is neither authorized by the Clean Air Act nor an appropriate exercise of agency authority at the present time and on the existing record. The judgment of the court of appeals upholding that decision—which is supported by separate opinions of the panel members rather than a single majority opinion and thus would provide a particularly poor vehicle for review—does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. As a threshold matter, petitioners lack standing to bring their challenge. "In every federal case, the party

bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). In addition to a showing of "injury in fact," the plaintiff must establish causation and redressability. The plaintiff must show that there is "a causal connection between the injury and the conduct complained of," so that the plaintiff's injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). The plaintiff must also show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (also quoting *Simon*).

Petitioners in this case failed to establish either causation or redressability. As Judge Tatel explained, the relevant particularized injury asserted in the declarations submitted by petitioners was that of the Commonwealth of Massachusetts, which asserted that greenhouse gas emissions would lead to global warming, which would cause rising sea levels, which in turn "would lead both to permanent loss of coastal land and to more frequent and severe storm surge flooding events along the coast." Pet. App. A27 (internal quotation marks omitted). Thus, to establish causation and redressability, petitioners had to do more than show that global warming, generally, would cause the alleged injury. Rather, they had to show that the subject of their rulemaking petition—greenhouse gas emissions from new motor vehicles in the United States—would, at least to a material extent, cause them the alleged injury.[3] In addi-

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[3] Under Section 202(a)(1), EPA may regulate only new motor vehicles and cannot impose controls on existing vehicles. Therefore,

tion, they had to show that a successful resolution of this case—a decision by EPA to impose emission standards on such new motor vehicles—would, to a material extent, redress that injury.

The declarations that petitioners submitted are insufficient to make those showings. Judge Tatel cited, as the best evidence of causation, a declaration asserting that global warming, chiefly triggered by anthropogenic greenhouse gas emissions, was increasing the sea level, with "the U.S. transportation sector (mainly automobiles) . . . responsible for about 7% of global fossil fuel emissions." Pet. App. A28 (citation omitted). Similarly, with respect to redressability, Judge Tatel cited a declaration asserting that "[a]chievable reductions in emissions of [carbon dioxide] and other [greenhouse gases] from U.S. motor vehicles would . . . delay and moderate many of the adverse impacts of global warming." *Id.* at A28-A29.

In light of the speculative nature of petitioner's theories, petitioners failed to establish that the injuries they allege from global warming are traceable to greenhouse gas emissions from new vehicles in the United States—rather than to greenhouse gas emissions from other sources in the United States, greenhouse gas emissions from vehicles or other sources elsewhere in the world, or entirely different factors—and that a decision to require regulation of emissions of greenhouse gases from new motor vehicles in the United States would redress their injuries. Petitioners allege only an indirect injury from vehicular emissions of greenhouse gases in the United States; they assert that such emissions will cause global warming, which in turn will cause sea levels to rise, which in turn will, in the case of

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petitioners have the burden of showing that regulation of new motor vehicles would provide redress for their alleged injury.

Massachusetts, damage its coastal property. As this Court has explained, "indirectness of injury, while not necessarily fatal to standing, may make it substantially more difficult * * * to establish that * * * the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Simon*, 426 U.S. at 44-45 (internal quotation marks and citation omitted). In this case, as in *Simon*, "[s]peculative inferences are necessary to connect [petitioners'] injury to the challenged actions," *id.* at 45, and a "federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than [petitioners] have shown before proceeding to the merits." *Id.* at 46.

Indeed, petitioners' standing allegations rest on speculation at two levels. First, petitioners' standing argument depends on their claim that greenhouse gases emitted by new motor vehicles in the United States *alone* are sufficient to cause, at least in material part, the injuries that they allege will occur from global warming. Petitioners' declarations, however, address the alleged causation of global warming by greenhouse gases emitted from many different sources and from many different countries throughout the world. Their declarations do not establish that the subject matter of this case—emissions of greenhouse gases by new motor vehicles in the United States—causes or meaningfully contributes to their injuries.

Second, petitioners' standing argument depends on the proposition that EPA, if it adopted standards to limit emissions of greenhouse gases from new vehicles in the United States, could limit such emissions sufficiently to have an appreciable effect on global warming and, ultimately, on the degree of injury petitioners allegedly would suffer. Petitioners' declarations do not establish that a mere reduction in greenhouse gas emissions from new vehicles in the United

States would be sufficient to eliminate or meaningfully reduce the harm that they allege they will suffer from global warming. Indeed, EPA concluded that it would not "be either *effective* or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time." Pet. App. A82 (emphasis added).

In concluding that petitioners had shown causation and redressability, Judge Tatel relied principally on the statement in one declaration that "[a]chievable reductions in emissions of [carbon dioxide] and other greenhouse gases from U.S. motor vehicles would . . . delay and moderate many of the adverse impacts of global warming." Pet. App. A28-A29. That conclusory statement was taken from the declarant's summary of his findings, but the balance of the declaration did not address the question of whether, or the extent to which, reductions in greenhouse gas emissions *from new motor vehicles in this country alone* would "delay and moderate" the injuries alleged by petitioners. To the contrary, the declarant's conclusion that EPA regulation of automobile emissions would redress the alleged harm appears to be based on his claim that, if EPA acts, then foreign governments will eventually take similar steps. See Pet. C.A. Standing App. 220 (para. 32) ("If the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U.S. program."). According to the declarant, "[w]ith such efforts, accompanied by progress in limiting other emissions, it would be much more likely that the extent of climate change could ultimately be limited to levels that would avoid the most serious impacts of global warming." *Ibid.*[4]

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[4] Judge Tatel also relied on another declaration that made essentially the same point. See Pet. App. A29 (quoting statement in declaration

In short, petitioners' theory is that redress of their alleged injuries would result only from a chain of causation beginning with EPA regulation, which would cause advances in technology, which would cause decisions by other countries similarly to limit vehicle emissions, which would cause an effect on global climate, and which would finally result in a redress of petitioners' alleged injuries. Such a chain of causation, involving coordinated actions by entirely independent third-party governments around the world, is far too speculative to support standing. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (Opinion of Kennedy, J.) (plaintiffs could not establish standing because whether their "claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors * * * whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict"); *Allen* v. *Wright*, 468 U.S. 737, 759 (1984) ("chain of causation" is "far too weak for the chain as a whole to sustain * * * standing," where it depended on actions of "numerous third parties" making "independent decisions").

In short, petitioners have failed to make the necessary showings of causation and redressability. The problem is not that there is a factual dispute raised by the declarations submitted by petitioners. Rather, the problem is that petitioners have failed adequately to present proof of causation and redressability, and therefore that they lack standing to bring this challenge.

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that "establishing emissions standards for pollutants that contribute to global warming would lead to investment in developing improved technologies to reduce those emissions from motor vehicles, and * * * successful technologies would gradually be mandated by other countries around the world").

2. On the merits, the court of appeals correctly upheld EPA's decision. Section 202(a)(1) of the Act, 42 U.S.C. 7521(a)(1), expressly conditions the establishment of motor vehicle emissions standards on a discretionary exercise of the Agency's "judgment" as to whether air pollution related to motor vehicle emissions "may reasonably be anticipated" to endanger public health or welfare. Because that provision expressly invokes the Administrator's "judgment," it provides EPA with substantial discretion in deciding whether and when an endangerment finding can or should be made in the first instance. Here, the Agency identified a variety of sensible and appropriate reasons—including the complex and highly uncertain nature of the scientific record and the Agency's desire to have the benefit of ongoing research—for its conclusion that even if it had authority to regulate greenhouse gas emissions from motor vehicles, an endangerment finding would be inappropriate at this time. That conclusion reflects a reasonable exercise of the Agency's discretion.

a. As the full D.C. Circuit explained 30 years ago in *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 20 n.37 (en banc), cert. denied, 426 U.S. 941 (1976), the "express provision for administrative discretion via the 'judgment' phrase [in CAA section 202(a)(1)] is necessary" precisely because that section requires EPA to initiate regulation once it makes a determination of "endangerment" to health or welfare. 541 F.2d at 20 n.37. Numerous other decisions stress EPA's discretion in deciding whether to make similar types of threshold regulatory determinations under similarly structured provisions of the CAA. See, *e.g.*, *Her Majesty the Queen in Right of Ont.* v. *EPA*, 912 F.2d 1525, 1533-1535 (D.C. Cir. 1990) (EPA has discretion whether and when to make the threshold finding as to whether or not there is "reason to believe" that emissions from sources in the United States

are causing a health or welfare endangerment in another country under Section 115(a) of the Act, 42 U.S.C. 7415(a)).[5] In particular, courts have recognized that EPA may properly defer making an endangerment determination while it waits for additional scientific and technical studies to be completed. *Her Majesty the Queen*, 912 F.2d at 1533-1534.

b. More generally, courts have long recognized that agencies are entitled to particular deference in deciding whether to grant rulemaking petitions.[6] As the D.C. Circuit

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[5] See *New York Pub. Interest Research Group* v. *Whitman*, 321 F.3d 316, 330-331 (2d Cir. 2003) (EPA has discretion whether or not to make the threshold "determination" regarding deficiencies in state operating permit programs under Section 502(i) of the Act, 42 U.S.C. 7661a(i)); *NRDC* v. *Thomas*, 885 F.2d 1067, 1073-1075 (2d Cir. 1989) (EPA has discretion in exercising its "judgment" as to whether emissions of hazardous air pollutants "may reasonably be anticipated" to result in certain types of illnesses under then-existing version of CAA Section 112(a)(1), 42 U.S.C. 7412(a)(1) (1988)); *Environmental Def. Fund* v. *Thomas*, 870 F.2d 892, 898-899 (2d Cir.) (EPA has discretion to make the threshold "judgment" as to when it is "appropriate" to issue revised NAAQS under Section 109 of the Act, 42 U.S.C. 7409), cert. denied, 493 U.S. 991 (1989).

[6] See, *e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.* v. *FERC*, 388 F.3d 903, 910-911 (D.C. Cir. 2004) ("[W]e will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.") (internal quotation marks and citation omitted); *National Mining Ass'n* v. *DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995) ("[A]n agency's refusal to initiate a rulemaking is evaluated with deference so broad as to make the process akin to non-reviewability.") (internal quotation marks and citation omitted); *Timpinaro* v. *SEC*, 2 F.3d 453, 461 (D.C. Cir. 1993) (such challenges will be granted "only in the rarest and most compelling of circumstances") (internal quotation marks and citations omitted); *General Motors Corp.* v. *National Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990) (judicial review is "especially narrow" in cases that involve challenges to the denial of a petition for rulemaking); *American Horse*

has stated, "[i]t is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute a rulemaking." *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818 (1981). Agencies have limited resources and therefore must have the latitude to set priorities among possible initiatives and to decide how any particular policy objective may best be pursued. See *id.* at 817 (recognizing that "[a]n agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution—*e.g.*, internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework.") (quoting *NRDC* v. *SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1971)). Accordingly, the D.C. Circuit has traditionally described its role in reviewing denials of rulemaking petitions as "limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record." *National Ass'n of Regulatory Util. Comm'rs* v. *DOE*, 851 F.2d 1424, 1430 (D.C. Cir. 1988) (internal quotation marks and citation omitted).

c. Against that background, the facts and policy concerns articulated by EPA were sufficient to sustain its decision that a finding of endangerment regarding greenhouse gas emissions from motor vehicles was not appropriate at this time. As Judge Randolph explained, EPA properly relied on an authoritative analysis by the NRC, an entity of the National Academy of Sciences, and that report supported the Agency's view that any decision whether or not to regulate in this area would be better made after further

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Prot. Ass'n v. *Lyng*, 812 F.2d 1, 4-6 (D.C. Cir. 1987) (denials of rulemaking petitions are entitled to the "high end" of deference).

research was conducted into critical areas of current scientific uncertainty. See Pet. App. A11-A13, A83-A85. In addition, EPA's decision properly took into account other legal and policy implications of any decision to initiate regulatory action at this time.[7]

d. Petitioners incorrectly assert (Pet. 14-15) that it was impermissible for EPA to conclude that an "endangerment" finding was inappropriate at the present time based on the existing scientific uncertainty and the other factors mentioned by EPA. In essence, petitioners argue that in acting on a petition to initiate rulemaking under Section 202(a)(1), EPA must make an express finding that endangerment is either present or absent, and may deny such a petition only if it makes the latter finding in definitive fashion. There is no precedential or statutory support for petitioners' position. As discussed above, cases such as *Ethyl* and *Her Majesty the Queen* make clear that EPA has significant discretion in making the judgments related to an endangerment finding under CAA Section 202(a)(1) and similar provisions. That discretion is particularly pronounced in cases such as this, which to a significant degree involve the more preliminary question of *when* it is appropriate to make an endangerment finding. See, *e.g.*, *WWHT, Inc.*, 656 F.2d at 817.[8]

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[7] See Pet. App. A13-A14 (discussing possible effects on United States foreign policy, the Agency's concern about initiating a "piecemeal" regulatory approach to these issues, and the concern that any effort by EPA to limit carbon dioxide emissions through the imposition of more stringent fuel economy standards would conflict with the Department of Transportation's regulation of fuel economy under EPCA).

[8] Neither *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), nor *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), supports petitioners' argument. See Pet. 8, 14. Those cases involved the extent to which costs can be considered by EPA in setting a NAAQS or approving a state implementation plan, respectively. This case, by contrast, involves the distinct threshold question of what factors EPA may

Moreover, such an approach would, in effect, deprive EPA of its statutory authority to exercise its "judgment" on the threshold determination of when it is appropriate to make an endangerment finding. In so doing, it would also effectively cede control over EPA's limited resources to anyone who submits a petition for rulemaking, and it would illogically force EPA to make regulatory decisions even when it reasonably viewed existing data as unreliable, uncertain, or inconclusive.

e. Petitioners are mistaken in suggesting (Pet. 14-16) that the CAA itself precludes EPA from considering the state of scientific uncertainty and other relevant factors in making the threshold determination of whether it is now appropriate to make an endangerment finding. Section 202(a)(1) simply states that any regulation in this area is conditioned on an exercise of EPA's "judgment," and it does not in any way cabin the Agency's discretion—procedural or substantive—to decide how to make that judgment most effectively.[9] In the absence of any such statutory constraints, EPA has discretion to make the threshold determination of whether the scientific record is sufficiently well developed to begin the regulatory process. See *Her Majesty the Queen*, 912 F.2d at 1533-1535 (upholding EPA's

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permissibly take into account in deciding when and whether to make an "endangerment" determination, not merely the factors to be consulted once EPA has decided to make such a determination.

[9] Nor does Section 202(a)(1) expressly address rulemaking petitions at all. By contrast, in other parts of the Act, where Congress has intended to prescribe aspects of the process EPA must follow in responding to such petitions, it has done so expressly. See, *e.g.*, 42 U.S.C. 7412(b)(3) and (4) (specifying timing and other requirements for consideration of petitions to modify the CAA list of hazardous pollutants and agency responses thereto); 42 U.S.C. 7661d(b)(2) (specifying the process for presentation and consideration of petitions to EPA to object to state CAA operating permits).

discretion to await the development of further information on potential remedial measures before making an endangerment finding under Section 115 of the CAA, 42 U.S.C. 7415, dealing with international air pollution); *Professional Drivers Council* v. *Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1222 & n.19 (D.C. Cir. 1983) (agencies may permissibly defer decision whether or not to regulate for a variety of reasons within their "special expertise," including whether "the scientific state of the art [is] such that sufficient data are not yet available on which to premise adequate regulations") (emphasis omitted) (quoting *NRDC* v. *SEC*, 606 F.2d at 1046).[10] EPA's decision is thus consistent with the statute, applicable precedent, and with the more general rule that courts should refrain from imposing rulemaking requirements on agencies that go beyond those imposed by Congress. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

f. Petitioners correctly point out (Pet. 15) that the D.C. Circuit's decision in *Ethyl* endorsed the notion that EPA's broad discretion under Section 202 of the Act could support a judgment to regulate, even if the record before the Agency evidences some scientific uncertainty, when the Agency deems such a course to be appropriate. See *Ethyl*, 541 F.2d at 27-28. Petitioners err, however, in arguing that because the Agency *may* permissibly proceed with regulation even in the face of some uncertainty, it *must* do so even when it has the type of legitimate policy concerns present

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[10] See *Sierra Club* v. *Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (denying an "unreasonable delay" claim and explaining that because EPA decisions about whether to regulate under the CAA "often involve[] complex scientific, technological, and policy questions," the Agency "must be afforded the amount of time necessary to analyze such questions so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion").

here. Instead, EPA has the discretion to make reasonable determinations in the first instance whether or not to proceed in the face of scientific uncertainty. The Agency's conclusion that an endangerment determination is not appropriate at this time was more than amply explained and supported by the record, and was properly upheld by the court of appeals.

3. Petitioners also argue that review is warranted to consider whether EPA correctly determined that it did not have authority under Section 202(a) of the Clean Air Act to regulate greenhouse gas emissions from vehicles for the purpose of addressing concerns about global climate change.

a. That issue was not decided by the court of appeals, see Pet. App. A10 n.1, and it has never been addressed by any other court of appeals. This Court rarely addresses a legal question without the benefit of any prior decisions by the lower courts. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992); *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990). No basis supports taking such an exceptional course here, because the court of appeals correctly denied the petitions for review on the grounds discussed above. Moreover, while regulation of greenhouse gas emissions from new motor vehicles would present the Agency with issues of quite extraordinary magnitude and would conflict with a key component of the CAA regulatory system, EPA's determination that it had no authority under the Act to institute such regulation is limited to the specific context of greenhouse gases and is unlikely to have a significant effect in other contexts.

b. In any event, EPA's conclusion that it did not have regulatory authority to regulate vehicular greenhouse gas emissions to address the problem of global warming reflects a reasonable interpretation of the CAA and is consis-

tent with applicable precedent. As this Court has frequently instructed, statutes must be read as a whole "since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569, 575 (1995); *McCarthy* v. *Bronson*, 500 U.S. 136, 139 (1991). Here, as was true of tobacco regulation in *Brown & Williamson*, there are persuasive reasons to conclude that the CAA, when read as a whole, does not confer authority on EPA to regulate emissions of greenhouse gases to address concerns about global climate change.

Nothing in the CAA indicates Congress's intent to regulate greenhouse gases for purposes of addressing global warming, and all indications that are present suggest that Congress intended a non-regulatory approach to those issues at this time. See Pet. App. A70-A71, A74-A75; see also *id.* at A71-A72 (noting Congress's distinctive approach, not merely making use of EPA's ordinary regulatory provisions, to address the global atmospheric issue of stratospheric ozone depletion). The NAAQS system—the CAA's primary tool for regulating pervasive air pollutants—is based on state-by-state analyses of compliance with national standards, and the Act imposes distinct regulatory regimes on attainment and nonattainment areas. See CAA Sections 110, 172 *et seq.*, 42 U.S.C. 7410, 7502 *et seq.* That system would serve no logical purpose in regulating carbon dioxide and other greenhouse gases, concentrations of which are not generally subject to substantial local or state-by-state variation but are instead global in nature. Pet. App. A71-A73. If petitioners were correct, "any [carbon dioxide] standard that might be established would in effect be a worldwide ambient air quality standard, not a national

standard—the entire world would either be in compliance or out of compliance," *id.* at A73, thus rendering the important statutory distinction between attainment and non-attainment areas meaningless. *Id.* at A73-A74. Effectively increasing fuel economy standards would be the only way EPA could attempt to limit vehicle emissions of carbon dioxide, but such EPA regulation would conflict with the separate statutory scheme that Congress carefully developed and expressly crafted to address fuel economy standards, under which a division of the Department of Transportation is responsible for such standards. See *id.* at A79-A80.[11]

In short, EPA reasonably concluded that the CAA does not confer authority on EPA to regulate greenhouse gas emissions to address global climate change. See Pet. App. A78. Section 202(a)(1) authorizes EPA only to regulate "any air pollutant," and "air pollutant" is in turn defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). Under that definition, "a substance does not meet the CAA definition of 'air pollutant' simply because it is a 'physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air.' It must also be an 'air pollution agent'" in order to be regulated under Section 202(a)(1). Pet. App. A79 n.3. For the reasons discussed above, EPA reasonably concluded that "the term 'air pollution' as used in the regulatory provisions [of the CAA] cannot be interpreted to encompass global climate change." *Id.* at A78. Therefore, carbon dioxide and

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[11] As the court of appeals noted, the rulemaking petition made "no suggestion" as to how emissions of the three greenhouse gases other than carbon dioxide that were the subject of the rulemaking petition might be reduced from motor vehicles. See Pet. App. A14.

other greenhouse gases "are not 'agents' of air pollution and do not satisfy the CAA Section 302(g) definition of 'air pollutant' for purposes of" the CAA's regulatory provisions, including Section 202(a)(1). *Ibid.*[12]

4. Finally, petitioners err in contending (Pet. 22-26) that further review is warranted because of the asserted urgency of the environmental issues involved. EPA has never contested that global climate change is an important issue worthy of focused attention, both in the United States and abroad. In fact, the Agency detailed in its decision in this case a variety of efforts that the federal government is currently undertaking to "effectively and efficiently address the climate change issue over the long term." Pet. App. A82; see *id.* at A82-A93. Those efforts, and others that could follow as the numerous scientific and factual questions involved in the issue of global warming are clarified further, are better tailored to address this quintessentially multinational issue than is the ill-suited regulatory machinery of the CAA, which could attack only a small and isolated part of it.

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[12] Petitioners and the dissenting judge below thus err in contending that EPA has disregarded the Act's "plain" text. Pet. App. A33; see Pet. 18. They erroneously assume that the definition of "air pollutant" necessarily encompasses *any* "physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air," see Pet. App. A32 (citing 42 U.S.C. 7602(g), but EPA has rejected that view, and has instead authoritatively construed the definitional provision's reference to "air pollution agent" to have independent meaning and effect. See *id.* at A78-A79 & n.3. That reasonable interpretation of the ambiguous statutory definition is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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